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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ASAEL AVID ALFARO, Defendant and Appellant.	B158275 (Los Angeles County Super. Ct. No. SA043550)

APPEAL from a judgment of the Superior Court of Los Angeles County. Lisa Hart Cole, Judge. Affirmed and modified, with directions.

Michele A. Douglass, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Scott A. Taryle and Carl N. Henry, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted appellant Asael Avid Alfaro of aggravated mayhem in violation of Penal Code section 205.[1] The jury found true the allegation that appellant personally inflicted great bodily injury upon the victim within the meaning of section 12022.7, subdivision (b). The court sentenced appellant to life in prison on the mayhem count and five years for the great bodily injury enhancement.

On appeal appellant argues: (1) the trial court erred in failing to instruct the jury that simple mayhem is a lesser included offense of aggravated mayhem, which violated appellant's state and federal constitutional right to due process of law and resulted in a miscarriage of justice requiring reversal; (2) the enhancement imposed pursuant to section 12022.7, subdivision (b) must be stricken because causing great bodily injury is an element of aggravated mayhem; and (3) the five-year term imposed for the great bodily injury enhancement must be stayed pursuant to section 654.

FACTS

I. Prosecution Evidence

On October 27, 2001, Scott Hannable went out for the evening with his girlfriend, Enza Cimarusti, and her friend, Heather Hogelund. They first went to a Hollywood nightclub called the Pig and Whistle. They each had an alcoholic drink and left after approximately half an hour. They went to a bar where they each consumed another alcoholic drink. Afterwards they went to a nightclub called Bar Fly in the Sunset Strip area where they each had another drink. They then went to the Argyle Hotel to meet Hannable's friends in the hotel lounge. The three were traveling around in Cimarusti's car, and Hogelund took the wheel on the way to the Argyle Hotel.

Hogelund parked the car near the exit side of the hotel's semicircle driveway. As Hannable and Cimarusti got out of the car, they were arguing as to why Hannable wanted to go home. Hogelund stayed in the car while Hannable and Cimarusti argued. Two men walked past the couple, and one of them, later identified as appellant, watched the argument for about 15 seconds.

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[1] All further statutory references are to the Penal Code unless otherwise stated.

At one point, Hannable began to walk away from Cimarusti. As he did so, appellant yelled something to the effect of, "Yeah, you'd better get out of here, mother fucker." Hannable turned around and asked appellant what he had said. Appellant replied, "You heard me. Get the fuck out of here."

Hannable walked towards appellant and said, "Who are you? This has nothing to do with you." The two men exchanged profanities as Hannable drew closer to appellant. When Hannable was close enough to stand face to face with appellant, appellant took a swing at Hannable and hit him in the jaw. The two men wrestled each other for a few seconds as they both tried to swing at the other. The man who had been walking with appellant approached the fight and tried to hit Hannable. Cimarusti yelled at the men to stop it. When she went up to them and tried to separate Hannable and appellant, she was knocked into a fence. This distracted Hannable, and appellant punched Hannable in the face while Hannable was looking over at Cimarusti. Appellant did not seem intoxicated and he was not staggering.

The punch caused Hannable to drop his hands, and he was no longer defending himself. At that point, appellant punched Hannable again, and Hannable fell over "like a tree." Hannable did not try to break his fall. As he lay in the gutter, he was not moving or kicking. As soon as Hannable fell, appellant ran over to where he lay and began stomping him on the head. A car was nearby, and appellant put his right hand on the trunk of the car, using it as leverage, while he stomped on Hannable's head "three times hard" with his shoe, which had "very thick soles."

Cimarusti was screaming, and she tried to grab appellant. Appellant turned around and knocked her to the ground. Appellant then ran away. Cimarusti ran after appellant and saw him get in the front passenger door of an "SUV-type" car parked behind her own car. Cimarusti pounded on the car and tried to open it, but the car drove away. It could not move quickly because of heavy traffic, however. Witnesses noted the car's license plate number and gave it to police. Police later located the car and gained information regarding appellant. Appellant underwent a videotaped interview, which was played to the jury at his trial. The police arrested appellant at the end of the interview.

While Cimarusti went after appellant, Hogelund, who was a licensed emergency medical technician, ran over to Hannable. She could not hear him breathe, and he did not respond to his name or to painful stimuli. A large amount of blood was coming from his head. His head was "tucked down" at a strange angle. A lot of blood was dripping from his mouth. Paramedics arrived and took Hannable to a hospital.

At appellant's trial, Cimarusti testified that she had moved to Hannable's house to help his parents care for him. Hannable needed 24-hour care and supervision. Before he was beaten by appellant, Hannable was "very athletic, energetic, quick-witted" and had "lots of personality." At the time of trial, he had not regained his personality. He found it difficult to smile. His reactions were slow, and he could not concentrate for very long. His motor skills were slow, and he had poor judgment. He had lost approximately 35 pounds and had also lost his muscle tone. Because of his condition, Hannable had lost joint custody of his son. He could not play ball or do any of the things he used to do with his son. He was not able to drive. He had received occupational, speech, and physical therapy at a rehabilitation center, and had needed to learn how to walk and groom himself again. One of his eyes was visibly larger than the other after the beating. Before the beating, he had a deep voice, but afterwards his voice was more like that of a young boy. He also had facial scars. He was unable to work. Hannable had undergone numerous surgeries for his injuries.

II. Defense Evidence

On the evening of October 27, 2001, appellant, his friend Herminio Ramirez, and four other men met at Ramirez's house. Appellant was approximately 22 years old. Appellant drank at least two bottles of beer at Ramirez's home. Afterwards, they drove to a store and bought beer and a bottle of Hennessey. Appellant drank at least two more bottles of beer and had one or two shots of Hennessey. They all went to a nightclub in Burbank, where appellant drank at least two more beers in the parking lot. Appellant had two more beers at the club. To Ramirez, appellant seemed to be intoxicated. They left the club around 1:00 a.m. and drove to the Sunset Strip area to cruise and talk to girls.

The group stopped at a gas station. Appellant seemed "still really drunk," and he walked around talking to girls in different cars. He walked around "everywhere talking to every girl." Because appellant crossed the street, Ramirez decided to drive over and pick appellant up. As he made a U-turn, Ramirez saw appellant fighting with another man. Appellant and the other man hit each other about two times. When the other man fell, appellant kicked him once. One of the men in Ramirez's group got appellant back into the car. Appellant was still "pretty much drunk." Ramirez drove home. Ramirez had never seen appellant fight prior to that night. Appellant was not a violent or confrontational person.

Appellant testified in his own behalf. He said that when he left the nightclub he was intoxicated and swaggering. He was in a relaxed mode. He was looking for a private place to relieve himself when he heard a couple arguing. He told the man to leave the woman alone. He and the man were "verbally going at it." Hannable pushed or shoved appellant, and appellant believed he had to act in self-defense. Appellant pushed back and they started swinging at each other. Appellant's friend, Nelson, came and tried to stop it. The next thing appellant knew, Hannable had dropped. At the time, appellant thought it was he who had landed the blow that made Hannable fall. At the time of trial, he believed it was his friend who hit Hannable. As soon as appellant saw Hannable drop to the ground, appellant "commenced stomping him." He made "three potential stomps," but was not sure all of them connected. The incident happened very quickly, and he did not at any time want to kill Hannable. He did not want to give Hannable a brain injury or to disfigure or permanently disable him. When asked why he stomped on him, appellant said he did not know. He was in shock and "misbelief" when the police told him the extent of Hannable's injuries. He had been "in fear of [his] life," and he lost control.

At appellant's trial, Darrell Clardy, a forensic toxicologist, testified about the impact of alcohol and its ability to cause impairment. When questioned with a hypothetical, Clardy expressed the opinion that a person who was six foot tall and weighed 180 pounds, and who drank eight bottles of beer and a "mixed drink" between the hours of 9:00 p.m. to 1:30 a.m., would have a blood alcohol content of about 0.20

percent at approximately 2:30 a.m. Clardy believed that such a person would have problems with awareness and perception and would lose his inhibitions. The person would lack judgment.

DISCUSSION

I. Simple Mayhem and Aggravated Mayhem

Appellant argues that the trial court should have instructed the jury on simple mayhem as a lesser included offense of aggravated mayhem. He claims that the jury could have found he did not have the specific intent to permanently disable Hannable and was therefore guilty of the lesser included offense. Respondent notes that no case has specifically held that simple mayhem is a lesser included offense of aggravated mayhem. Respondent argues that, in the instant case, the evidence of specific intent was overwhelming, and no instruction on simple mayhem was required.

Appellant was charged with aggravated mayhem as follows: ". . . the crime of aggravated mayhem, in violation of Penal Code section 205, a felony, was committed by Asael Avid Alfaro, who did unlawfully and under circumstances manifesting extreme indifference to the physical and psychological well being of another, intentionally cause permanent disability and disfigurement and deprivation of a limb, organ and body member of" Scott Hannable.

Section 203 describes the crime of simple mayhem and provides: "Every person who unlawfully and maliciously deprives a human being of a member of his body, or disables, disfigures, or renders it useless, or cuts or disables the tongue, or puts out an eye, or slits the nose, ear, or lip, is guilty of mayhem."[2]

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[2] According to the jury instruction on simple mayhem, the elements of the offense are: "1. One person unlawfully and by means of physical force [deprived a human being of a member of [his] [her] body or, disabled, permanently disfigured, or rendered it useless;] [or] [_____ of a human being;] and [¶] 2. The person who committed the act causing the bodily harm, did so maliciously, that is, with an unlawful intent to vex, annoy, or injure another person." (CALJIC No. 9.30.)

Section 205 describes the crime of aggravated mayhem and provides in pertinent part: "A person is guilty of aggravated mayhem when he or she unlawfully, under circumstances manifesting extreme indifference to the physical or psychological well-being of another person, intentionally causes permanent disability or disfigurement of another human being or deprives a human being of a limb, organ, or member of his or her body. . . ."[3]

"An uncharged crime is included in a greater charged offense if either (a) the greater offense cannot be committed without committing the lesser, or (b) the language of the accusatory pleading encompasses all the elements of the lesser offense." (*People v. Wolcott* (1983) 34 Cal.3d 92, 98.) If the question is whether an instruction on the lesser offense is proper or required sua sponte, the court must look to the accusatory pleading, in addition to the statute, to determine if the offense is described "'in such a way that if committed as specified the lesser offense is necessarily committed.'" (*People v. Miranda* (1994) 21 Cal.App.4th 1464, 1467.) If the greater offense is described by the accusatory pleading then the lesser is necessarily included even though, as the offenses are described in the statutory definitions, it is possible to commit the greater without committing the lesser. (*Ibid*.) The evidence in support of the conviction is not to be considered. (*People v. Ortega* (1998) 19 Cal.4th 686, 698; *People v. King* (2000) 81 Cal.App.4th 472, 475.)

Although there are no cases specifically holding that simple mayhem is a lesser included offense of aggravated mayhem, the court in *People v. Hill* (1994) 23 Cal.App.4th 1566, 1569 assumed this to be true. (See also, *People v. Lee* (1990) 220

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3 As the jury was instructed, the elements of aggravated mayhem are: "1. One person intentionally and unlawfully [caused another person to sustain permanent disability or disfigurement] [or] [deprived another person of a limb, organ, or member of his or her body]; [¶] 2. The person who inflicted the injury did so with the specific intent permanently to disable, disfigure, or to deprive the other person of a limb, organ or member of [his] [or] [her] body; [¶] 3. The person who inflicted the injury did so maliciously, that is, with an unlawful intent to vex, annoy, or injure another person; and [¶] 4. That person engaged in the conduct under circumstances which demonstrated [his] [her] extreme indifference to the physical or psychological well-being of the person subsequently injured." (CALJIC No. 9.32.)

Cal.App.3d 320, 325 [concluding that an indiscriminate attack on the victim was not aggravated mayhem]; *People v. Ferrell* (1990) 218 Cal.App.3d 828, 832-833 [holding that aggravated mayhem is a specific intent offense and outlining factors indicating the existence of specific intent].)

Assuming, but not deciding, that simple mayhem is a lesser included offense of aggravated mayhem, we conclude that any error in failing to instruct on simple mayhem was harmless.

"'"The trial court has a sua sponte duty to instruct on lesser included offenses when the evidence raises a question as to whether all of the elements of the charged offense were present and there is evidence that would justify a conviction of such a lesser offense. [Citation.]"'" (*People v. Hughes* (2002) 27 Cal.4th 287, 365.) Regardless of the relative strength of the evidence supporting convictions of lesser included offenses, the trial court is obliged to give sua sponte instruction on all theories of lesser included offenses that are supported by substantial evidence. (*People v. Breverman* (1998) 19 Cal.4th 142, 159-160, 162 (*Breverman*).)

The "existence of '*any* evidence, no matter how weak' will not justify instructions on a lesser included offense." (*Breverman*, *supra*, 19 Cal.4th at p. 162.) In determining whether substantial evidence exists to support an instruction on a lesser included offense, trial courts should not usurp the jury's function of evaluating the credibility of witnesses. (*Ibid*.) Substantial evidence means, in this context, '"'evidence from which a jury composed of reasonable [persons] could . . . conclude[]"' that the lesser offense, but not the greater, was committed." (*Ibid*.)

Here, there was not substantial evidence in support of a charge of simple mayhem, as opposed to aggravated mayhem. As stated in *People v. Lee*, *supra*, 220 Cal.App.3d at page 325, the specific intent required for aggravated mayhem may be inferred from the circumstances of the crime, the manner in which the crime is committed, and the means used, among other factors. (*Id*. at p. 325.) The court in *People v. Ferrell*, *supra*, 218 Cal.App.3d 828 distinguished aggravated from simple mayhem by noting that aggravated mayhem required the defendant's attack on the victim's body to be controlled and

directed rather than random. (*Id*. at p. 835.) The circumstances of the instant crime and the manner in which it was committed lead to the conclusion that appellant possessed the required specific intent. Appellant's attack was directed, controlled and focused on smashing in Hannable's head. The evidence showed that appellant went over to the gutter, where Hannable had fallen "like a tree," and that Hannable was no longer moving. Nevertheless, appellant purposefully put his hand on a parked car for leverage and forcefully stomped on Hannable's head three times with his thick-soled shoe.

It is true that appellant testified he stomped on Hannable's head to prevent Hannable from getting up and harming him, and that appellant was intoxicated at the time. The record shows, however, that Hannable was already rendered helpless by the blow prior to the one that felled him. Hogelund testified that Hannable had dropped his hands before appellant landed the punch that made Hannable fall. Appellant's claim of intoxication as negating specific intent is belied by the fact that, after he finished stomping on Hannable's head, he had the presence of mind to run to his friend's vehicle and flee. A witness testified that appellant was not staggering and did not appear to be intoxicated.

In any event, the jury was fully instructed on the relevance of voluntary intoxication to the element of specific intent required to convict appellant of aggravated mayhem.[4] The jury nevertheless found appellant had the required intent.

A conviction resulting from error may only be reversed if "after an examination of the entire cause, including the evidence" (Cal. Const., art. VI, § 13), it appears

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[4] The trial court read CALJIC No. 4.21, as follows: "In the crimes of attempted murder and aggravated mayhem of which the defendant is accused in Counts One and Two, or that of attempted voluntary manslaughter, which is a lesser crime of attempted murder, or in the allegation that the defendant inflicted great bodily injury causing brain damage a necessary element is the existence in the mind of the defendant of the specific intent to kill, or cause great bodily injury causing brain damage. [¶] If the evidence shows that the defendant was intoxicated at the time of the alleged crime, you should consider that fact in deciding whether defendant had the required specific intent. [¶] If from all the evidence you have a reasonable doubt whether the defendant formed that specific intent, you must find that he did not have that specific intent."

"reasonably probable" the defendant would have obtained a more favorable outcome had the error not occurred. (*People v. Blakeley* (2000) 23 Cal.4th 82, 93.) In this case, the evidence raised no question as to whether all the elements of the greater offense were present. Appellant therefore suffered no prejudice by the lack of an instruction on simple mayhem. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

II. Enhancement Pursuant to Section 12022.7, Subdivision (b)

Appellant argues that the great bodily injury enhancement must be dismissed because causing great bodily injury is an element of aggravated mayhem.

At the time of appellant's offense and conviction, section 12022.7, subdivision (a) provided in pertinent part that any person who inflicted great bodily injury on any other person in the commission of a felony must receive a consecutive term of three years, *unless infliction of great bodily injury was an element of the offense* of which the defendant was convicted.

Section 12022.7, subdivision (b) provided: "A person found to have inflicted great bodily injury pursuant to subdivision (a) *which causes the victim to become comatose due to brain injury or to suffer paralysis*, as defined in Section 12022.9, of a permanent nature, shall be punished by an additional and consecutive term of five years." (Italics added.)

The statute went on to prescribe an additional term of five years when great bodily injury was inflicted on a person 70 years of age or older or on a child under the age of five, *unless infliction of great bodily injury was an element of the offense*.

Only in section 12022.7, subdivision (b), when the injury caused the victim to become comatose due to brain injury, and in subdivision (e), which imposed an enhancement when great bodily injury was inflicted during an incident of domestic violence, did the statute fail to provide that the enhancement should not be imposed when the infliction of great bodily injury was an element of the offense.

Although defense counsel objected to the enhancement, the record shows that the trial court was persuaded by the prosecution's argument that, although great bodily injury is an element of aggravated mayhem, "[section] 12022.7(b) is very specific and

articulates a specific type of injury which elevates, for lack of a better term, the kind of injury, not whether it's G.B.I. or not, but the kind of injury that has occurred. And I think that although in aggravated mayhem you clearly have G.B.I., it is not specific as to the type of injury. [Section] 12022.7(b) makes the type of injury specific."

The court found that the injuries to Hannable's eye and the loss of hearing in his left ear and the scarring of his face would have been alone sufficient to satisfy section 205. The court ruled that the brain damage suffered by Hannable was outside the intention of section 205, but within the intention of section 12022.7, subdivision (b). The court then imposed a five-year enhancement under section 12022.7, subdivision (b) in addition to the life term required under section 205.

Appellant argues that the changes in section 12022.7 that became effective on January 1, 2003, indicate that the failure to include the phrase "unless great bodily injury is an element of the offense" in former subdivision (b) was the result of an oversight. The statute now omits this crucial phrase from subsections (a) through (d). In its place the statute added language to subdivision (g) providing that "Subdivisions (a), (b), (c), and (d) shall not apply if infliction of great bodily injury is an element of the offense." Thus, a defendant convicted of aggravated mayhem who causes the victim to become comatose or to suffer paralysis due to brain injury (§ 12022.7, subd. (b)) will no longer be susceptible to the great bodily injury enhancement.

Respondent argues that the omission of the exception from former subdivision (b) coupled with its inclusion in former subdivision (a) meant that the Legislature intended subdivision (b) to be accorded a different meaning than that of subdivision (a). According to respondent, any suggestion that the changes made in the statute indicate that the former language was the result of an oversight is sheer speculation.

We conclude that appellant is entitled to the retroactive benefit of the amendments to section 12022.7. "An amendment to a criminal statute which mitigates punishment operates retroactively so that the lighter punishment is imposed, unless there is a savings clause. [Citations.] This rule also applies to the repeal of a criminal statute. [Citation.] The rule is applicable not only to statutes concerning underlying offenses, but also to

statutes concerning penalty enhancements. [Citations.] This 'principle is based on presumed legislative intent.' [Citation.] Where a criminal statute is amended to repeal another criminal statute, reduce the punishment for a criminal offense, or modify the elements of a penalty enhancement, an offender of the law that has been so amended is entitled to the benefit of the amendment unless the Legislature indicates a contrary intent. [Citation.]" (*People v. Roberts* (1994) 24 Cal.App.4th 1462, 1466.) "Absent a savings clause, a criminal defendant is entitled to the benefit of a change in the law that occurs during the pendency of his or her appeal." (*People v. Figueroa* (1993) 20 Cal.App.4th 65, 70, citing *People v. Babylon* (1985) 39 Cal.3d 719, 722.)

In the instant case, the amendment is beneficial to appellant, and the legislation contains no savings clause. Therefore, appellant is entitled to the retroactive benefit of the amendment. The enhancement must be stricken.[5]

DISPOSITION

The judgment is modified to strike the five-year enhancement imposed pursuant to section 12022.7, subdivision (b). The superior court is directed to modify appellant's abstract of judgment accordingly and forward the corrected abstract to the Department of Corrections. In all other respects the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, P.J.
BOREN

We concur:

_____, J.
NOTT

_____, J.
ASHMANN-GERST

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[5] Since we are striking the enhancement we do not address appellant's claim that section 654 requires the five-year enhancement to be stayed.